SUPREME COURT, U.S.

71-501

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

* * * *

DR. J. W. EDGAR,
COMMISSIONER OF EDUCATION,
AND THE TEXAS EDUCATION AGENCY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

* * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

* * * *

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

* * * *

Petitioner, Dr. J. W. Edgar, Texas Commissioner of Education, and the Texas Education Agency, pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on July 9, 1971.

OPINIONS BELOW

The opinions below are unreported. The order of the Court of Appeals is attached as appendix "A". The District Court has written two times: the first opinion and order is reported in 321 F. Supp. 1043 (1970); appendix "B" is a supplemental memorandum opinion of May 11, 1971.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Judgment of the Court of Appeals was entered July 9, 1971. Motion for stay was denied July 16, 1971. No motion for rehearing was filed.

QUESTIONS PRESENTED

May a United States District Court require the Texas Education Agency to perform functions delegated by state law solely to local school boards, when the local boards are before the Court and when no necessity (as opposed to administrative convenience) requires that the state's statutory scheme be changed in order to fashion an effective remedy?

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Appendix "C" contains the texts of the constitutional and statutory provisions listed below.

A. U. S. Const., Amend. XIV.
B. 78 Stat. 252, 42 U.S.C. §2000d.
C. Tex. Const., Art. VII, Sec. 1.
D. Tex. Const., Art. VII, Sec. 8.
E. Texas Education Code, Sec. 11.01.
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G. Texas Education Code, Sec. 12.61.
H. Texas Education Code, Sec. 16.13.
I. Texas Education Code, Sec. 16.52.
J. Texas Education Code, Sec. 19.231.
K. Texas Education Code, Sec. 19.261.
L. Texas Education Code, Sec. 23.50.
M. Article 2696a, Revised Civil Statutes of Texas, as amended.
N. Article 2815-4, Revised Civil Statutes of Texas, as amended.

STATEMENT

This case was instigated by the Federal Government under the 1964 Civil Rights Act, 78 Stat. 252 (1964) against a number of all-black school districts located in various parts of East Texas. Various county boards of education and adjoining school districts were made parties

to the suit. Petitioners were made parties allegedly because they are the disbursers of state funds.

Following a series of hearings, the trial court consolidated some of the local districts with adjoining districts and entered certain other orders against the local boards and county boards regarding the all-black districts. By and large, the local school districts and county boards conceded that something was wrong and needed to be done regarding the all-black districts, and the local boards recognized the authority for eliminating these districts had been placed in their boards by the Texas Legislature. Petitioners have no quarrel with the trial court's elimination of the all-black districts in question, but the trial court did not stop with the resolution of the problem at hand, but entered additional orders, which petitioners submit exceed the authority of the trial court.

The trial court, over the strenous objection of petitioners, then undertook the task of re-writing the school laws of Texas to drastically alter the role of the State Board of Education, and likewise change the statutory authority of local school districts.

The Fifth Circuit Court of Appeals without a hearing to petitioners summarily disposed of this cause, and substantially affirmed the trial court.

REASONS FOR GRANTING THE WRIT

The issue raised by this case concerning the separation of powers of the judiciary and the Legislature is an important question of constitutional law and has never been decided by this Court.

This Court has long adhered to the concept that it is the duty of the courts to construe and enforce the constitutions and the laws of the land, and the courts should not legislate social policy or re-write the statutes or acts of the legislative branch to reach some end which may be desired by the

courts. *Dewey v. United States,* 178 U.S. 510 20 S.Ct. 981, 44 L.Ed. 170 (1899); *United States v. Cooper Corp.,* 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1940); *Salsburg v. Maryland,* 346 U.S. 545, 74 S.Ct. 280, 98 L.Ed. 281 (1953); *Evans v. Abney,* 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634, (1970); 16 Corpus Juris Secundum, "Constitutional Law", Section 151(1), pages 725-731.

Section 1 of Article VII, Texas Constitution, provides:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

Section 11.01 of the Texas Education Code, provides:

> "The State Board of Education, the State Board for Vocational Education, the state commissioner of education, and the State Department of Education shall comprise the Central Education Agency. It shall carry out such educational functions as may be assigned to it by the legislature, but all educational functions not specifically delegated to the Central Education Agency shall be performed by county boards of education or district boards of trustees."

Petitioners submit that this provision seems clear enough. The State Legislature has restricted the functions of the Texas Education Agency (Central Education Agency) to the role of carrying out specifically assigned tasks. Local school boards are authorized to perform all additional tasks necessary to implement the mandate of the people placed upon the Legislature by Section 1 of Article VII of the Texas Constitution.

Texas schools have always operated with a maximum of local control, and petitioners submit that such control is consistent with democratic principles recognized by this Court in *James v. Valtierra,* 402 U.S. 137 (1971).

The lower court's order in this case very clearly is a judicial transgression into the area of legislation protected

by the Constitution of the United States. Petitioners submit the lower courts in the instant case have completely changed the role of the State Board of Education of Texas from one of an advisory nature to one of enforcer of civil rights. The order also has the effect of depriving local independent districts of much of the autonomy which has been their well established role since the inception of the Texas school system.

The trial court's order, as affirmed by the circuit court, is very lengthy and detailed, and involves every aspect of the operation of the school districts of Texas. In order not to overburden this application, but to point out some of the areas where the lower courts have re-written the state law, and in effect repealed the state law, petitioners would cite a few examples:

(a) STUDENT TRANSFERS BETWEEN DISTRICTS

The effect of the trial court's order as affirmed by the circuit court is to have the Appellants ignore the specific commands of the Legislature on transfer of students between districts. This the trial court does by writing into the state statute (Article 2696a) a new requirement that the petitioners approve all student transfers. The order amounts to judicial legislation of the state statutory scheme of student transfers and funds which accompany such transfers.

Insofar as transfer of students between school districts is concerned, the trial court's order of April 20, 1971, requiring the Texas Education Agency to supervise and approve all student transfers is a complete rewriting of our transfer law by the trial court.

(b) SCHOOL DISTRICT BOUNDARIES

Under Texas law school district boundary changes are a matter for the people (voters) and local county boards of education. The reason for this is obvious, since more than

the race of students is involved in deciding school district boundaries, many factors have to be considered, such as taxes, roads, buildings, distance, etc.

The trial court, by its order of April 20, 1971, has now ordered the Texas Education Agency to become the great overseer of all boundary changes in spite of the fact that the Legislature has defined their role otherwise. (Sec. 11.14, Texas Education Code.)

By the order of April 20, 1971, the trial court, as affirmed by the circuit court, has once again passed legislation completely changing Texas law, and grossly enlarging the role of the Texas Education Agency.

(c) STATE FUNDS

The petitioners submit that they act as distributor of the State's Foundation School Funds. Chapter 16, Texas Education Code. The Foundation School Program is a statutory formula for determining the amount of State aid based upon local need. Section 189, Texas Juris.2d, pages 516-517.

The petitioners have only discretionary duties in regard to the State funds and cannot withhold such funds on the basis that they are going to a racially segregated school district. *McKinney v. Blankenship,* 154 Tex. 632, 282 S.W.2d 691 (1955).

The trial court in the instant case has re-written the State's Foundation School Program and in effect ordered the petitioners to ignore State law as interpreted by the Texas Supreme Court in *McKinney v. Blankenship,* supra.

Petitioners subscribe to the trial court's conclusion that our system of government required cooperation between governments to achieve compliance with the law and success as a nation. The record in this cause shows that such cooperation has been achieved between the State and Federal Government to a large extent.

Likewise, petitioners subscribe to the long recognized principle of law to the effect that the courts must not let the expedient of the moment obliterate the clear provisions of the law.

Petitioners are presently attempting to implement the court's order after having exhausted all possible stay remedies, and find that they are having to ignore commands of the Texas Legislature set out in the statutes of the State, and believe such actions on their part to the intolerable to the various school districts of Texas, and just as importantly to the law-abiding citizens of Texas.

Petitioners submit the effect of the decision of the trial court in this case as affirmed by the circuit court is to ask the petitioners to serve two masters which they cannot do.

Last, but not least, the lower courts have transgressed the constitutional prohibition on separation of powers, and have taken upon themselves the task of writing the school law of Texas instead of properly implementing the equity powers recognized in *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 2 (1971) and judicially determining where the authority, and thus the failure to desegregate the Texas school system, really lies, the trial court has legislatively placed this authority upon the State Board of Education, and then ordered it to correct any desegregation problems.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Writ of Certiorari was served upon Respondents by placing same in the United States Mail with sufficient postage attached and addressed to the attorneys of record for Respondent, Mr. Roby Hadden, U. S. Attorney, P. O. Box 1049, Tyler, Texas 75701, Mr. David L. Norman, Acting Assistant Attorney General, Department of Justice, Washington, D.C. and Mr. Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C.

Pat Bailey

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1061

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STATE OF TEXAS, ET AL., and DR. J. W. EDGAR, COMMISSIONER OF EDUCATION, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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(July 9, 1971)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

BY THE COURT: The Order of November 24, 1970,[1] is hereby affirmed. The Order of April 20, 1971,[2]

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[1] *United States v. Texas*, 321 F.Supp. 1043 (E.D.Tex. 1970).
[2] *United States v. Texas*, ____ F.Supp ____, Part II (E.D. Tex. 1970).

is hereby affirmed except that the District Court shall modify said Order as follows:

1. With respect to School Transportation, paragraph C(3) shall provide that in no event shall this paragraph be construed as requiring any fixed percentage of students of a minority group on a particular route or run.

2. With respect to Extra-Curricular Activities, it shall be provided that any school district aggrieved by the proposed reduction or the reduction of Minimum Foundation Program Funds, or the proposed suspension or the suspension of accreditation shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said Court may deem proper.

3. With respect to Faculty and Staff, it shall be provided that any school district aggrieved by the proposed termination or the termination of Minimum Foundation Funds or the proposed suspension or the suspension of accreditation shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said Court may deem proper.

4. Paragraph E(6) under Faculty and Staff shall be stricken with the provision that the Order shall not be construed to have any effect upon the state or federal remedies available to any individual members of Faculty or Staff for discriminatory action by a school district in assignment, demotion, dismissal, reassignment, payment or other employment conditions.

5. With respect to Student Assignment, paragraph F(1) shall be amended to add at the end of the sentence the words, "except where required to comply with constitutional standards."

6. It shall also be provided with respect to Student Assignment that if a school district which is reviewed pursuant to paragraph F(3) is the subject of a school desegregation suit or a court-approved plan of desegregation, a copy of the report required by paragraph F(3) shall be submitted to the District Court having jurisdiction of such suit or plan.

7. Because of the interdistrict operation of the Order in this case, this Court directs that the Order of April 20, 1971, shall include the following paragraph:

> "Nothing herein shall be deemed to affect the jurisdiction of any other district court with respect to any presently pending or future school desegregation suits."

8. We direct that the Texas Education Agency file copies of this Order with every United States District Court in the State of Texas in which there is a school desegregation suit or court-approved plan in sufficient numbers to permit any such court to file a copy in each such cause. The Clerks of each such District Court are hereby directed to file said copies in each school desegregation cause pending in their District.

This case is remanded to the District Court with directions to re-enter the Order of April 20, 1971, as modified herein.

AFFIRMED in part; MODIFIED and REMANDED with directions.

APPENDIX

EXHIBIT "C"

Filed: Apr. 20, 1971

ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA
CIVIL ACTION
No. 5281

versus

STATE OF TEXAS, ET AL.

On November 24, 1970, this Court entered an order in this case then styled *United States of America v. State of Texas, et al.*, Civil Action No. 1424, Marshall Division, requiring *inter alia* that the Texas Education Agency, the State Commission of Education and their officers, agents, employees, successors re-evaluate all of their activities and practices relating to the desegregation of public elementary and secondary education within the State of Texas; upon completion of this re-evaluation the defendants were required to file a plan stating specific actions which they would take pursuant to their affirmative obligations under Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution. On January 15, 1971, the defendants filed their plan. Plaintiffs filed a response to

this plan on February 1, 1971, incorporating both objections to defendants' plan and recommendations for what the defendants were legally required to accomplish by this plan. An evidentiary hearing was held on February 1 and 2, 1971. A further hearing was held in Tyler on April 12, 1971, the case then, and hereafter, being styled Civil Action No. 5281, Tyler Division.

The Court has carefully considered the submissions of the respective parties and the evidence presented at the hearings, in light of the defendants' affirmative duty to take "whatever steps might be necessary to . . . [eliminate] racial discrimination root and branch." *Green v. New Kent County*, 391 U.S. 430, 437-38 (1968), *Swann v. Charlotte-Mecklenburg Board of Education*, Nos. 281 and 349, ____ U.S. ____, (April 20, 1971). In this regard the duty of the state appears to be two-fold: *First*, to act at once to eliminate by positive means all vestiges of the dual school structure throughout the state; and *second*, to compensate for the abiding scars of past discrimination.

Accordingly, it is hereby ORDERED that the State of Texas, Dr. J. W. Edgar, Commissioner of Education of the State of Texas, the Texas Education Agency, their officers, agents, employees, successors and all other persons in active concert or participation with them (hereinafter referred to as defendants) shall fulfill those duties as follows:

A. *Student Transfers*

(1) Defendants shall not permit, make arrangement for or give support of any kind to student transfers, between school districts, when the cumulative effect in either the sending or receiving school or school district will be to reduce or impede desegregation, or to reinforce, renew, or encourage the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin.

(2) The Texas Education Agency shall review all student transfers and shall notify the sending and receiving districts promptly of all transfers which do not appear to comply with the terms of this Order.

(3) If, after receiving notice of the Texas Education Agency's refusal to approve transfers, the receiving district shall continue to accept the transfer of students, or if the sending district shall refuse to provide suitable educational opportunities for these students, defendants, after 15 days notice to the President of the Board of Trustees and the Superintendent (if the district has such an official), shall refuse to transfer the funds, based on the average daily attendance of the transfer students involved to the account of the receiving district, and shall, thereby, terminate and refuse to grant or continue paying to the affending district a percentage of state funds equivalent to the district's entitlement based on the average daily attendance of the students transferring in violation of this Order.

(4) Defendants shall also refuse to distribute to the offending district any transportation funds which might accrue on account of transfer students accepted in violation of this Order. If the offending district continues to refuse to deny transfers which adversely affect desegregation, the Texas Education Agency shall warn the district that its accreditation status is in danger. This warning shall remain in effect for ten days, at which time, if the offending district has failed to correct its violations, the Texas Education Agency shall suspend the district's TEA accreditation.

B. *Changes in School District Boundaries*

(1) Defendants shall not permit, make arrangements for, approve, acquiesce in, or give support of any kind to changes in school district boundary lines – whether by detachment, annexation, or consolidation of districts in whole

or in part — which are designed to, or do in fact, create, maintain, reinforce, renew, or encourage a dual school system based on race, color, or national origin.

(2) Defendants shall require the board of trustees of any school district desiring to annex or consolidate with a nearby district, in whole or in part, or desiring to change its boundaries in any other manner such as is described, for example, in Part II-A(2) of the Court's Order of November 24, 1970, to report said intention to the Commissioner of Education for the State of Texas at least 15 days prior to the effective date of such action, and shall take appropriate measures to insure compliance with this requirement.

(3) Whenever the Commissioner shall receive notice that a district or a portion of a district is to be detached from, annexed to, or consolidated with another district, he shall institute an immediate investigation as to the effects of such projected change of boundaries on the desegregation status of all of the school districts concerned. He shall promptly notify the appropriate county and local officials of his findings, and indicate whether or not the transfer of territory is in violation of the law.

(4) If county and local officials proceed to consummate the transfer of territory after being notified that they are in violation of the law, defendants, after 15 days notice to the President of the Board of Trustees and the Superintendent of the district (if the district has such an official), shall refuse to transfer funds, based on the average daily attendance of the students in the territory detached, annexed or consolidated, to the account of the new district, and shall, thereby, terminate and refuse to grant or continue paying to the offending district a percentage of state funds equivalent to the district's entitlement based on the average daily attendance of the students detached, annexed or consolidated in violation of this Order. These

funds shall be distributed to the remander of the original district, in cases of illegal detachments, but shall not be used by that district to support the education of children living in the detached area. In cases involving the consolidation of whole districts, the Texas Education Agency shall hold the funds derived from the average daily attendance of the students illegally annexed to or consolidated with the new district in escrow pending dissolution of the illegal transfer of territory and the return of students to their original districts.

(5) Defendants are enjoined from granting "incentive aid" payments pursuant to Texas law (Art. 2815-4, Vernon's Texas Revised Civil Statutes as amended), to districts which are enlarged by annexations or consolidation actions in violation of this Order.

(6) Should a county board of education or a school district, having received notice from the Commissioner that a territorial alteration has been disapproved, fail to disavow the action and to declare its effects null and void, the Texas Education Agency shall notify the district that its accreditation status is in danger. This notice shall remain in effect for 10 days, at the end of which time, if the offending district has failed to correct its violations, the Agency shall suspend the district's TEA accreditation.

(7) In all cases involving annexation or consolidation of school districts, the Texas Education Agency shall apply the portions of the Order of the Court in this case dated April 19, 1971, concerning the annexation of nine all-black school districts to nearby bi-racial districts, and specifically, the portions of that Order relating to faculty and staff and to bi-racial committees, to the newly enlarged districts and shall require the said district to submit to the Texas Education Agency such reports as may be necessary to enable that Agency to determine whether the newly

enlarged district is operating and will continue to operate in compliance with Title VI and the Fourteenth Amendment.

C. *School Transportation*

(1) Defendants shall not permit, make arrangement for, acquiesce in, or give support of any kind to bus routes or runs which are designed to, or do in fact, create, maintain, reinforce, renew, or encourage a dual school system based on race, color, or national origin.

(2) The transportation system in those county units and school districts having transportation systems shall be completely re-examined each year by the Texas Education Agency. Bus routes and runs as well as the assignment of students to buses will be designated to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis. Bus routes and runs shall be constituted to provide that each bus operated by a district picks up every pupil along the route or run who is assigned to the school or schools and grade levels served by that bus. Where two or more equally efficient and economical routes or runs are available in a given area of the school district, the route or run which would promote or facilitate desegregation of buses shall be adopted by the district and approved by the Texas Education Agency rather than a route or run which, whether by intent, inaction, or inadvertence, would maintain or encourage segregation.

(3) Accordingly, if upon examination of transportation systems, the Texas Education Agency shall find that a district is operating one or more bus routes or runs which serve 66% or more students of a minority group, which are duplicated by one or more routes or runs serving more than 66% students of another race or ethnic background, the Texas Education Agency shall immediately investigate and determine whether the heavily minority routes

or runs may be re-routed, terminated or combined with routes or runs which serve non-minority students so as to desegregate these routes or runs.

(4) If the Texas Education Agency finds that a county or local district is operating its transportation system in violation of this Order, it shall notify the appropriate officials of the local district. If the offending district refuses to alter its bus routes or runs so as to avoid segregation in instances where the Texas Education Agency has determined that such alterations are necessary, or if such a district persists in operating bus routes or runs which adversely affect the desegregation of its schools, classes, or extra-curricular activities, the Texas Education Agency shall refuse to approve the entire route structure of the district, and shall, thereby, terminate and refuse to grant or continue paying state transportation funds to the offending district until it shall have altered all routes or runs operated in violation of this Order, so as to eliminate all vestiges of discrimination based on race, color, or national origin. In addition, the Texas Education Agency shall notify the district that its accreditation status is in danger. This notice shall remain in effect for 10 days, at which time, if the offending district has failed to correct its violations, the Agency shall suspend the district's TEA accreditation.

D. *Extra-Curricular Activities*

(1) Defendants shall not permit, make arrangement for, acquiesce in or give support of any kind to activities run in connection with the elementary and secondary educational program operated by the state or any of its county and local educational agencies which, whether by intent, inaction, or inadvertence, results in segregation or other discrimination against students on the grounds of race, color, or national origin. These extra-curricular activities include, but are not limited to, student government organ-

izations, athletic teams for inter-scholastic competition, clubs, hobby groups, student newspaper staffs, annual staffs, band, band majorettes and cheerleaders.

(2) The Texas Education Agency shall instruct the members of its accreditation review teams in conjunction with its Title IV staff, to examine the extra-curricular activities of each district which they review. All violations of this Order which are discovered by such investigations shall be reported to the Commissioner of Education. If the Texas Education Agency receives complaints from any source that a school district is operating and supporting extra-curricular activities in violation of this Order, immediate investigation shall be made of such complaint.

(3) If the Commissioner finds that a district is operating and supporting extra-curricular activities in violation of this Order, he shall notify the county or local school district through the President of its Board of Trustees and through the Superintendent (if the district has such an official), that the district is operating in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. At the same time, he shall warn the district that its accreditation is in danger. This warning shall remain in effect for 10 days, at which time, if the district has failed to correct the violations, the Texas Education Agency shall suspend the district's TEA accreditation.

(4) In addition to the suspension of the accreditation of districts operating discriminatory extra-curricular activities, the State of Texas and the Texas Education Agency shall reduce the percentage of state funds granted to the district under the Minimum Foundation Program for salaries and operating expenses by ten percent. Should the district persist in operating its extra-curricular activities in a manner which results in segregation or discriminatory treatment of students on account of race, color, or national

origin, the State of Texas and the Texas Education Agency shall reduce the percentage of state funds as described above by an additional ten per cent for each semester or term that the violations continue.

(5) Defendants are required to consider that a suspension or reduction of programs and activities to avoid operating them on a desegregated basis constitutes a violation of Title VI and the Fourteenth Amendment.

E. *Faculty and Staff*

(1) Defendants shall not permit, make arrangement for, acquiesce in or give support of any kind to the hiring, assigning, promoting, paying, demoting, reassigning or dismissing, or treatment of faculty and staff members who work directly with children in a discriminatory manner on account of race, color, or national origin. Defendants shall be responsible for the application and enforcement throughout the State of the provisions of the Order of the Court in this case dated April 19, 1971, referred to in Section 3, paragraph 7 herein, and specifically, the portions of that Order relating to the treatment of faculty and staff.

(2) In carrying out its affirmative duties under Title VI and the Fourteenth Amendment in this area, the Texas Education Agency shall require each county or local educational agency desiring to receive state funds under the Minimum Foundation Program to include with its preliminary application for such funds a list of objective, non-racial and no-ethnic criteria by which the county or local district will measure its faculty and staff for assignment, promotion, demotion, reassignment or dismissal and by which it will judge prospective employees for faculty and staff positions.

(3) The Texas Education Agency shall require the members of its accreditation review teams, in conjunction with the members of its staff designated to work in colla-

boration with the United States Office of Education to provide technical assistance to desegregating school districts pursuant to Title IV of the Civil Rights Act of 1964 (hereinafter referred to as "Title IV staff" or "Title IV personnel"), to examine the faculty and staff hiring and assigning practices of the districts which they visit for accreditation purposes, and to examine the records relating to hiring, assigning, promoting, paying, demoting, reassigning or dismissing of faculty and staff who work directly with children for a period including the three years prior to the complete elimination of the district's dual school structure. The review teams and state Title IV personnel shall also examine faculty assignments within each school district under review to determine whether the percentage of minority teachers in each school is substantially the same as the percentage of minority teachers in the school district as a whole, as required under Part II, Section A of the Order of this Court dated April 19, 1971, and referred to in Sections B(7) and E(1) herein. Any evidence of discriminatory practices concerning faculty and staff shall be reported to the Commissioner of Education.

(4) After such further investigation as deemed necessary by the Commissioner, he shall notify the district through the President of its Board of Trustees and its Superintendent (if the district has such an official), of any acts and practices with regard to faculty and staff which violate the areas described in Part II, Section A, of the Order of this Court, dated April 19, 1971, referred to in Section B(7), E(1) and E(3) herein. At the same time, he shall warn the district that its accreditation is in danger. This warning shall remain in effect for 15 days, at which time, if the offending district fails to correct its violations with regard to faculty and staff who work directly with children, the Texas Education Agency shall suspend the district's TEA accreditation.

(5) In addition to the suspension of accreditation, the State of Texas and the Texas Education Agency shall refuse to approve the district's application for state funds under the Minimum Foundation Program for salaries, and shall, thereby, terminate and refuse to grant or continue paying such funds to the district.

(6) Defendants shall require a school district which has been found to have engaged in discriminatory practices in regard to the assignment, demotion, dismissal, reassignment or payment of faculty or staff to restore or offer to restore the faculty or staff member to his (or her) original position held prior to the discriminatory action and to pay the faculty member for any time he (or she) was unemployed or employed at a lower salary level because of the discriminatory action of the district, and for which he (or she) was not adequately compensated.

F. *Student Assignment*

(1) Defendants shall not permit, make arrangement for, acquiesce in or give support of any kind to the assignment of students to schools, individual classrooms or activities on the basis of race, color or national origin.

(2) Defendants, having identified pursuant to this Court's order of November 24, 1970, school districts whose enrollment of minority race children is greater than 66% and whose total student population is fewer than 250 students, shall show cause by August 15, 1971, why each such school district should not be annexed to or consolidated with one or more independent school districts of over 150 students, or one or more common school districts of over 400 students, so as to eliminate its existence as a racially or ethnically separate educational unit.

(3) Defendants shall review each year all school districts in the state in which there exist schools enrolling

more than 66% minority group students, as reported in accordance with Part II(E) (6) of the Court's order in this case dated November 24, 1970, and shall make findings as to whether or not the student assignment plans of these districts have resulted in compliance with federal constitutional standards. On October 1, 1971, and on the same date each subsequent year until further order of this Court, defendants shall file a report with the Court indicating (1) the school districts reviewed and the particular findings concerning the assignment and transfer of students within each such district; (2) what steps each district is taking to eliminate their racially and ethnically identifiable schools and what recommendations defendants have proposed in this regard; and (3) what special cultural and educational activities these districts have instituted to compensate for the inherently unequal educational opportunities provided to students in these racially or ethnically identifiable schools. Copies of this report shall be served upon the Civil Rights Division of the United States Department of Justice and the Office for Civil Rights of the United States Department of Health, Education and Welfare. A copy of this report shall also be retained in the Offices of the Texas Education Agency in such a manner that it will be readily and conveniently available for public inspection during normal business hours.

G. *Curriculum and Compensatory Education*

(1) Defendants shall insure that school districts are providing equal educational opportunities in all schools. The Texas Education Agency, through its consulting facilities and personnel, shall assist school districts in achieving a comprehensive balance curriculum on all school campuses, and, where necessary, in providing for students to transfer to different schools in the district on a part-time basis to avail themselves of subjects not offered in their assigned school. Full time transfers may be allowed only

where they do not adversely affect desegregation as further described in Section A herein.

(2) The Texas Education Agency shall institute a study of the educational needs of minority children in order to insure equal educational opportunities of all students. The Texas Education Agency shall request the assistance of the United States Office of Education and any other educational experts whom they choose to consult in making this study. By not later than August 15, 1971, a report on this study shall be filed by the Texas Education Agency with the Court including:

(a) Recommendations of specific curricular offerings and programs which will insure equal educational opportunities for all students regardless of race, color or national origin. These curricular offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation, as well as programs and curriculum designed to meet the special educational needs of students whose primary language is other than English;

(b) Explanation of presently existing programs funded by the State of Texas or by the Federal Government which are available to local districts to meet these special educational needs and how such programs might be applied to these educational needs;

(c) Explanation of specific standards by which the defendants will determine when a local district, which has racially or ethnically isolated schools or which has students whose primary language is other than English, shall be required by the defendants to participate in the special compensatory educational programs available; and

(d) Explanation of procedures for applying these standards to local districts including appropriate sanctions to be employed by the defendants should a district refuse to participate in special compensatory educational programs where it has been instructed to do so pursuant to application of the standards developed under subsection (c) above.

(e) Copies of this report shall be served as described in Section F above, and a copy shall also be retained in the Offices of the Texas Education Agency as described therein.

H. *Complaints and Grievances*

The defendants shall send to all county and local educational agencies an information bulletin designed to notify faculty, staff and patrons of local school districts of the availability of complaint and grievance procedures and to inform them of how to utilize these procedures. Defendants shall further require that every county and local educational agency shall place this bulletin on public display in such a way as to assure its availability at all times during school hours. A copy of this bulletin shall be filed with the Court on or before August 15, 1971, with a copy to the plaintiff.

I. *Notification*

The defendants, in all cases where notification is given to a school district of imminent loss of accreditation or state funds because of its failure to meet the requirements of Title VI, Civil Rights Act of 1964 and the Fourteenth Amendment, shall, at the same time, notify the plaintiff. In the event that it becomes necessary to suspend the district's accreditation or to reduce or remove state funds the defendants shall also notify the plaintiff.

J. *Jurisdiction*

This Court retains jurisdiction of this matter for all purposes, and especially for the purpose of entering any and

all further orders which may become necessary to enforce or modify this decree.

SIGNED and ENTERED this 20th day of April, 1971.

(Signed) WM. WAYNE JUSTICE
UNITED STATES
DISTRICT JUDGE

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

UNITED STATES OF AMERICA
STATE OF TEXAS, ET AL.

CIVIL ACTION NO. 5281

SUPPLEMENTAL MEMORANDUM OPTION

A Memorandum Opinion in this case was ruled on December 4, 1970, and dealt primarily with the legal basis for this Court's action in its Order of November 24, 1970.[1] Among other things, that Order directed that

> [D]efendant school districts, their superintendents, the county boards of education, and county superintendents [to] collaborate with the defendant Texas Education Agency and the Office of Education of the Department of Health, Education and Welfare in the preparation of desegregation which shall insure that no child shall effectively be denied equal educational opportunities on account of race, color or national origin.

In addition, the Texas Education Agency (hereinafter sometimes referred to as TEA), its officers and others were directed to

> [R]e-evaluate all of their activities and practices relating to the desegregation of public elementary and secondary education within the state of Texas [and] to file with this Court a plan of specific action which the defendant State Agency may take pursuant to its affirmative obligations under Title VI and the Fourteenth Amendment to (*inter alia*)
>
> (1) Change or modify present administrative practices or policies . . . (and)
>
> (2) Employ . . . sanctions to enforce federal constitutional and statutory standards . . . .

[1]This case was styled *United States* v. *State of Texas, et al.* C.A. 1424 (Marshall Division) until March 9, 1971, at which time it was transferred to the Tyler Division and styled C.A. 5281.

The defendants complied with these directives, and numerous plans and proposals were submitted to this Court for the desegregation of the three school districts still remaining in existence as all-black administrative units at the time of the issuance of the November 24, 1970, Order. Brief status reports were also filed concerning the six other all-black districts involved in this case which had been annexed to adjacent school districts during the pendency of the proceedings. In addition, the Texas Education Agency submitted a plan regarding its future actions to eliminate from public elementary and secondary education in Texas all vestiges of segregation based on race, color, or national origin. The United States filed an extensive response to this plan.

It then remained for the Court to issue a decree to desegregate the nine all-black school districts and to order into effect a plan under which the State of Texas, through its appropriate education agencies at the state, county and local levels, will be required to fulfill its concurrent responsibility with that of the Federal government to eliminate the dual school system and to assure that no child in the State is effectively excluded from any school on the ground of race, color, or national origin. *Green* v. *New Kent County*, 396 U.S. 19 (1969); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, Nos. 281 and 349, ____ U.S. ____ (Decided April 20, 1971).

The Court has chosen to issue two orders at this time, the first directed at the desegregation of the various all-black school district, and the second concerning the future actions of the State and its educational agencies. This Opinion is intended to clarify both of these Orders and to explain to some extent the Court's reasoning on a number of difficult issues which arose in the course of its consideration of the case.

I.

The Court will first address itself to the Order of April 19, 1971, dealing with the desegregation of the all-black school districts. As indicated in the Conclusions of Law and the Order of November 24, 1970, and in the December 4, 1970, Opinion, this Court believes that:

> Separate neighboring or overlapping school districts, one black and the other white, are unconstitutional when created and maintained to perpetuate a dual school system, and such districts require consolidation with nearby units so as to assure their students equal educational opportunities. *Haney* v. *County Board of Education of Sevier County*, Arkansas, 410 F.2d 920 (8th Cir. 1969); *United States* v. *Bright Star School District #6*, No. T-69-C-24 (W.D. Ark. April 15, 1970); *Turner* v. *Warren County Board of Education*, 313 F. Supp. 380 (E.D.-N.C. 1970), *affirmed sub nom. Turner* v. *Littleton-Lake Gaston School District*, C.A. 14,990 (4th Cir. March 23, 1971).

The Court further believes that:

> Actions of the State or any of its agencies or officials resulting in the creation, operation, support and general supervision of small school districts whose school facilities are attended exclusively or almost exclusively by members of one race and whose existence cannot be rationalized upon sound educational grounds are unconstitutional in that they result in the denial to students of equal educational opportunities. *Turner* v. *Warren County Board of Education, supra.*

Accordingly, the Court has determined that the law requires that each of the all-black school districts involved in this case be annexed to or consolidated with a nearby unit with bi-racial enrollment in order to achieve meaningful desegregation and to create, at the same time, a stable, administratively and educationally sound school district.

Little explanation is needed concerning the portion of the Order requiring the appropriate county boards of education to annex the Butler and Cason Independent School Districts to the Fairfield and Daingerfield Independent School Districts respectively. The county boards of educa-

tion are empowered to take such action under Texas law, Texas Education Code (1969) Section 19.001. Moreover, in light of the record showing, among other things, the promimity of the two districts involved in each instance, as well as the previous actions involving territorial gerrymanders and student transfers which contributed to the creation and perpetuation of Butler and Cason as all-black districts, these orders of annexation seen amply justified. Moreover, the United States Office of Education and the State, through the Texas Education Agency, concur in the recommendation that these annexations constitute virtually the only solutions to the problem of eliminating Butler and Cason as segregated school districts.

Because of the location of the all-black St. Paul-Shiloh Common School District and the high percentage of minority students residing in the adjacent districts within or partly within Leon County, the elimination of St. Paul-Shiloh as an all-black entity presented more difficulties than did the elimination of Butler and Cason. The inherent complexity of this situation was further reinforced by the fact that the Office of Education filed numerous proposals with the Court designed to desegregate St. Paul-Shiloh, all of which would have eliminated the district and hence have achieved some desegregation. The Court's task, therefore, was to determine the solution which would, in the words of the Supreme Court, "achieve the greatest amount of actual desegregation," *Swann* v. *Charlotte-Mecklenburg, supra,* and which could, thereby, insure the provisions of equal educational opportunities to all of the children in the area as required by the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. See first Opinion issued in this case, 321 F.Supp. 1043 (E.D. Tex. 1970).

In addition, the Court believed that if a proper solution to the elimination of the all-black districts could be found consistent with State law, such a solution should be given

preference to one requiring a Federal Court to override state law, provided no substantial reduction of desegregation would result. Accordingly, in attempting to reach an equitable solution to the elimination of St. Paul-Shiloh as an all-black district, the Court determined to seek the "greatest amount of actual desegregation," if possible, within the limits of State law, but in no event to create a school district which was more than 66% black.

In this connection, the Court, in line with its initial Order in this case dated November 24, 1970, believes that a district which is created and maintained with a 66% or higher minority group student body must be considered a minority school district, and that the existence of such a unit creates a strong presumption that the educational opportunities provided to these minority students are inherently unequal to the offerings of nearby districts whose student bodies are more racially or ethnically mixed. *Brown* v. *Board of Education*, 347 U. S. 433 (1954), (*Brown I*), *Brown* v. *Board of Education*, 349 U.S. 294 (1955), (*Brown II*); *Haney* v. *Sevier, supra; Turner* v. *Warren, supra.* The same premise might reasonably be applied in defining a segregated, minority school or school bus, although the presumption of unlawful action may lessen somewhat in the latter case, particularly in districts which are transporting students in accordance with Federally approved desegregation plans. Moreover, where state action or inaction of any kind may be shown to have contributed to the creation, operation or perpetuation of a racially isolated district as described above, it may be said that the district is part of an unconstitutional structure based on the provisions of separate education for minority children. *Griffin* v. *Board of Education*, 296 F.Supp. 1178 (E.D. Va. 1969) (3-judge court). See also Conclusion of Law, number 7 in this case, issued November 24, 1970.

A study of the alternatives proposed by the Office of

Education as well as the recommendations of the Texas Education Agency reveals that the easiest solution to the elimination of the St. Paul-Shiloh School District would be to order the annexation of this all-black unit to the Oakwood Independent School District which is located in Leon and Freestone Counties, and adjacent to St. Paul-Shiloh to the north on a direct highway. Oakwood's school facilities are more than ample to accomodate the approximately 90 children from the all-black district and are located only sixteen miles from the St. Paul-Shiloh community. Such an arrangement, however, would increase the minority percentage of the Oakwood district – already over 50% – to 66%, the percentage previously determined by this Court to affect adversely the educational opportunities offered by the district. With this in mind, the Court continued to explore each alternative, weighing the practicalities such as distance and school capacities against the amount of additional desegregation which would be achieved.

The second most logical solution to the problem lay in ordering the annexation of St. Paul-Shiloh to the Centerville Independent School District which is located in Leon County adjacent to St. Paul-Shiloh to the south and southwest. While this solution again would have required only one annexation action by the county board of education and would have reduced the minority percentage in the combined district from 66% to approximately 59%, the children from the St. Paul-Shiloh area would have had to travel a minimum of 30 miles to reach the Centerville schools.[3] Although the distance in itself would not have been prohibitive, *Swann* v. *Charlotte-Mecklenberg, supra,* the Court believed that unless such an arrangement would

[3]Testimony showed that this distance would increase substantially if measured from the northern rather than the southern half of the St. Paul-Shiloh District.

result in a substantial increase in the amount of desegregation over that obtainable under other plans, and unless there were no other equally effective alternatives, such as an annexation should not be ordered.

Each of the remaining alternatives presented by the Office of Education at the hearing on February 3 and 4, 1971, would have resulted in desegregation of St. Paul-Shiloh. All of those proposals, however, presented one major flaw; to accomplish the redistricting recommended, it would have been necessary for the Court to act in contravention of State law which prohibits county boards of education from detaching portions of school districts without the approval of a majority of the qualified voters residing in the territory to be detached. Thus, the division of St. Paul-Shiloh or of Lone Star without such approval would have been illegal under Texas law. Texas Education Code (1969), Section 19,261.[8]

The Court gave long and careful consideration to these proposals, particularly in light of the obvious advantages to be gained in the form of increased desegregation and increased educational benefits deriving from enlarging the school districts in question. Moreover, the Court was mindful that as a matter of law, adherence to the requirements of the Federal Constitution and a Federal Statute would justify overriding state law if no other satisfactory solution were readily available. The Court, therefore, turned to consideration of other alternatives.

The Court did not look with favor upon the possibility of annexing both St. Paul-Shiloh and Oakwood to the Tucker Independent School District in Anderson County

[8]Likewise, the detachment of portions of Buffalo and/or Centerville would not have been consistent with state law absent the approval of the districts involved.

across the Trinity River. The solution would have required most of the St. Paul-Shiloh children to travel about 60 miles a day to attend the Tucker Schools. Both the Texas Education Agency and the Office of Education were unenthusiastic about the educational value of this proposal, and, consequently, the Court felt compelled to reject it. Likewise, the Court considered and subsequently rejected the possibility of annexing both Oakwood and St. Paul-Shiloh to the Buffalo Independent School District which lies adjacent to Oakwood in Leon and Freestone Counties. Under the arrangement, the St. Paul-Shiloh children would again have had to travel about 60 miles a day. Moreover, there was testimony which tended to show that Buffalo's classroom capacity would not have been sufficient to house the additional 350 children.

The final alternative proposed by the Office of Education provided for the annexation of St. Paul-Shiloh to Oakwood, as in alternative 1. In order, however, to counter the increase of black students which, as noted above, would have rendered the combined approximately 66% black, the Office of Education suggested the additional annexation to Oakwood of the Lone Star Rural High School District with its student body of approximately 89 scholastics, approximately 60% of whom were white. This annexation would bring the combined district to barely 56% black. It was also suggested that a group of about 42 white children living at the Pleasant Hill Children's Home at the southern edge of the Fairfield Independent School District and bordering Oakwood on the north, be transferred to Oakwood. This action would have brought the Oakwood-St. Paul-Shiloh-Lone Star District to about 54% black.

The annexation of Lone Star appeared reasonable in that the district, while not directly adjacent to Oakwood or St. Paul-Shiloh, is separated from it by only a narrow

finger of land. Lone Star operates only an elementary school, and its high school students must, even now, transfer elsewhere. The record shows that at least one child living in the strip between Lone Star and Oakwood is presently enrolled in Oakwood, and that at various times during the past few years a number of Lone Star students, particularly some of those in the high school grades, have attended school in Oakwood. The distance between most of Lone Star and the Oakwood schools is less than twenty miles, and since the district is entirely rural, virtually all of its students, even at the elementary level, are presently transported to school.

It is apparent from testimony that popular opinion in Lone Star would not support annexation to Oakwood. The Lone Star District, however, is too small under any educational standards available to the Court, including the Report of the Texas Governor's Committee, Volume IV (Government Exhibit 101 A (4)) to allow for the provision of quality education except at exorbitant cost to the taxpayers,[4] and the annexation to Oakwood could be ordered under Texas law regardless of the lack of continuity of the two districts. Texas Education Code (1969), Section 19.-001 51 Tex.Jur.2d Rev. (Part 1), Schools, Section 25. The annexation of Lone Star to Oakwood would substantially increase desegregation in the Oakwood-St. Paul-Shiloh district and clearly would benefit the elementary students from Lone Star by enlarging their scope of contact with other children and by providing for continuity in the flow of their education from grade 1 through grade 12. There was no showing that the assignment of Lone Star's high school students to Oakwood would have a substantial adverse effect on their education. Moreover, as has been established by the Supreme Court, community hostility to

[4]See also Conclusion of Law 15 issued in this case, November 24, 1970.

desegregation may not be permitted to interfere with the vindication of the constitutional right of children to receive equal educational opportunities. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Having considered this alternative in light of the goal to be achieved and in view of the other facts already mentioned, the Court has concluded that the annexation of St. Paul-Shiloh and Lone Star to Oakwood would constitute the most realistic way in which to secure meaningful and stable desegregation for the children in the districts affected. The only question remaining was whether or not to require in addition, the transfer to Oakwood of the 42 white children living in the Pleasant Hill Children's Home. As noted above, this Court remains undeterred by the opposition of popular opinion, and it is not mere community hostility, therefore, which has guided the Court in its decision. Unless substantial gains in desegregation were to be made, the Court felt that it should avoid change and disruption for orphaned and neglected, dependent children whose sense of security may depend largely on the constancy of their daily and, hence, of their academic environment. In this situation, were the orphan children to be transferred to Oakwood, the combined district including both Lone Star and St. Paul-Shiloh would remain over 50% black, and the overall percentage of black students would be reduced by only about 2% by the transfer of the orphans. In addition, the percentage of white children in the Fairfield District where the orphans are now enrolled would drop to just over 50%. Thus, the Court has concluded that the transfer action of the special condition of the orphan children, the Court has decided against ordering them transferred at the present time.

II.

The second Order issued by the Court, dated April 20, 1971, deals with the actions to be required of the State of

Texas through its educational agencies at the state, county and local levels to eliminate all vestiges of discrimination from public school education within the State and to promote through affirmative action consistent with the spirit of *Green* v. *New Kent County Board of Education, supra,* the provision of equal educational opportunities to all children in compliance with Federal constitutional and statutory requirements.

In its Memorandum Opinion of December 4, 1970, the Court stated that "the policies and practices of TEA in administering the public school system in Texas have frequently – whether inadvertently or by design – encouraged or resulted in the continuation of vestiges of racially segregated public education within the State." 321 F.Supp. 1043 (E.D. Tex. 1970). The impetus for the scope of this portion of the Order, therefore, came largely from the Court's belief that the all-black school districts involved in this case could not have operated without state support and that, as a consequence, it would be advisable to delineate for the State with some care how to avoid such deprivations of constitutional rights in the future. As the Supreme Court stated in *Swann* v. *Charlotte-Mecklenburg, supra*:

> The problems encountered by the district courts and Courts of Appeals make plain that we should now try to amplify guidelines, however incomplete or imperfect, for the assistance of school authorities and courts. (footnote omitted). (Slip Opinion Page 9).

The court further believes that its entire concept of appropriate relief in this case is consistent with the Supreme Court's opinion in *Swann*. As the high court declared:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown

> II. That was the basis for the holding in Green (*New Kent County*, supra). That school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' 391 U.S., at 437-438.
>
> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> • • •
>
> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation.
>
> Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults. *Swann* v. *Board of Education*, Slip Opinion 10-11 (April 20, 1971).

It is, of course, well to note that in a case such as the one at bar "local authority" must be read as referring to state as well as to county and local officials and administrative bodies, since the constitutional deprivations found in this case resulted from "defaults" at all levels of the state educational system. Finally, however, the Supreme Court noted "the basis of . . . (any) decision (involving the remedy for state-imposed segregation) must be the prohibition of the Fourteenth Amendment that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *Swann*, supra, at 13.

In accordance with the above reasoning, the Texas Education Agency was directed, under the November 24, 1970, Order, to develop a plan outlining future action to be taken by the state to accomplish this purpose. The Agency submitted such a plan prior to the hearing in February 1 and 2, and the United States filed a Response in which it pointed out possible ways to develop and refine proposals

made by the State and offered a number of proposals of its own.

Specifically, the April 20, 1971, Order covers some of the most important areas in which affirmative state action could obliterate remaining vestiges of the dual school system and prevent their recurrence. These areas include student transfers, changes in school district boundaries, school transportation, extracurricular activities, faculty and staff practices, student assignment, curriculum and compensatory education. In each area, the Court has attempted to combine the proposals submitted by the State and those contained in the Government's Response in light of the legal principles which this Court believes to be prevailing.

The background and legal basis for each area covered by the Order appears to be as follows:

1. *Student Transfers*

Under present practice, TEA does not exercise direct control over regular student transfers between districts. Such transfers are arranged pursuant to parental request to the receiving district's superintendent but without the permission or approval of the home district or TEA. §2696a, Vernon's Texas Rev. Civil Statutes (1969). These transfers, once reported to TEA, entitle the receiving district to the state *per capita* funds and average daily attendance earned during the prior school year by the transferring student.

The TEA's present practice is to advise school districts of the HEW policy that:

> . . . School systems are responsible for assuring that no arrangement is made nor permission granted for students residing in one school system to attend school in another school system in any case where the result tends to maintain what is essentially a dual structure in either system.

The guiding principle in this Circuit relating to student transfers supports the HEW policy statement. The Fifth Circuit declared in *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1218 (5th Cir. 1969):

> The school district shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available, and where his race is in the minority.
>
> • • •
>
> If the school district grants transfers to students living in the district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a non-discriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district or reinforce the dual school system.

Accordingly, in line with this decision and consistent with the provisions in the TEA plan relating to student transfers, the Court believes it to be essential that the State Agency review all student transfer requests and that it refuse to approve or support any such requests the cumulative effect of which, in terms of the Order in this case, "will be, in either district, to reduce or impede desegregation, or which will reinforce, renew or encourage the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color or national origin."

2. *Changes in School District Boundaries*

Under Texas law, school districts may be consolidated pursuant to the approval of the majority of the qualified voters in each district. Texas Education Code (1969), Sections 19.231 *et seq.* In addition to consolidation of districts, school district boundary lines may be altered by annexation or detachment of territory with the consent of the voters residing in the area affected, Texas Education Code (1969), Section 19.261 *et seq.*, and, under certain condi-

tions, a county board of education may annex one school district to another, whether or not such action is requested or approved by the voters residing in the district to be annexed. Texas Education Code (1969), Section 19.001. Annexations and detachments of territory may be appealed to TEA by residents or school districts involved. Texas Education Code (1969), Section 11.13.

The State Agency asserts in its plan that it has no knowledge of any prior consolidation of schools districts

> where the intent was to reduce or impede desegregation or which renewed or encouraged the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin.

The State also maintains that it has no authority under Texas law to challenge the validity of any consolidation or closing of any public school. Texas Education Code (1969), Section 11.14. Consequently, the State declined in its plan to take direct action to prevent consolidations which may result in deterring desegregation, although it has agreed to adjudicate complaints involving detachment or annexation if and when such complaints are received by the Agency.

The State's position is unacceptable to the Court insofar as its fails to recognize its affirmative obligation to eliminate discrimination "root and branch," Green, supra, and relies instead upon the manifestation of intent in determining where it will fulfill its duty — existing concurrent with that of the Federal Government — to enforce the mandate of Title VI and the Fourteenth Amendment. The existance of unconstitutional discrimination is not determined solely by intent, and the State is prohibited from any act abridging the constitutional rights of children to equal education opportunities whether attempted directly or by evasive schemes. *Cooper* v. *Aaron, supra; Bush* v. *Orleans*

Parish School Board, 190 F.Supp. 861 (E.D. La. 1960) (3-judge court), *aff'd sub nom. City of New Orleans* v. *Bush*, 336 U.S. 212 (1961). The Court has, consequently, required that all boundary change proposals be submitted to TEA for approval prior to their going into effect. Any such proposals which appear to violate the Court's Order should be denied approval and should receive no financial support from the State.

3. *Transportation*

The Texas Education Agency currently exercises a large amount of control over school transportation. Texas Education Code (1969), Sections 16.51 *et seq*. Under the Minimum Foundation Program, the State funds a substantial portion of a district's transportation costs. Texas Education Code (1969), Section 16.56 *et seq*. All buses eligible for state aid must operate on routes approved by the county board and the Commissioner of Education, and the violation of this provision may result in the withholding of transportation funds from the offending County or district. Texas Education Code (1969), Section 16.55. In the event that the offending district receives no Minimum Foundation Program funds,[8] the transportation regulations may be enforced by criminal sanctions. Texas Education Code (1969), Section 4.18.

TEA proposed in its plan that beginning in the 1971-72 school year, it would require districts to report the race of students transported on each route operated for which the district is requesting state transportation funds. The Agency would then order an investigation of "separate" routes prior to September 1 and would refuse to approve a transportation system containing "separate" routes, "if

[8]Some districts known as "budget-balance" districts have a large amount of local available funds and do not qualify to receive state aid for salaries and operations of transportation.

designed to separate Negro and white students," until such routes are changed.

The State plan again places emphasis on the intent or "design" demonstrated in the operation of bus routes resulting in the segregation of children on the ground of race, color or national origin. The Court believes that the Agency's reviews of separate bus routes or runs[6] should apply both to separate routes or runs resulting from intentional acts to segregate as well as to routes or runs which have the effect of separating children on racial or ethnic grounds if reasonable alternative routes may be developed and adopted by the county or local transportation administrator which will avoid segregation.

The Court again turns to *Singleton* v. *Jackson Municipal Separate School District, supra,* where the Fifth Circuit declared:

> The transportation system in those school districts having transportation systems shalls be completely re-examined regularly by the superintendent, his staff and the school board. Bus routes and the assignment of students to busses will be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise nondiscriminatory basis.

In addition, the United States District Court in *United States* v. *State of Georgia,* C.A. No. 12,972 (N.D. Ga. Jan. 13, 1971), stated in a case affecting 81 local districts in the state:

> Bus routes shall be constituted to provide that each bus operated by the district picks up every pupil along the route who is assigned to the school(s) and grade level served by that bus. Where two equally efficient and economical routes are available in a given area of the school district the route which would promote desegregation of buses shall be adopted rather than a route which woud maintain segregation.

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[6]Since so-called routes often include several trips or runs, the State must be required to examine the runs rather than only the routes. This complete review would enable the State to determine whether a given route includes duplicative runs.

In this connection, it should also be noted that the *Georgia* order quoted above requires the State Education Agency to review all transportation plans submitted by the affected school districts and to report to the court as to whether these plans satisfy the standards set in the Order. This Court believes that TEA should, similarly, be requested to inform local districts of these standards and to review local routes on the basis of these standards.

4. *Faculty and Staff*

Through the Minimum Foundation Program, TEA is responsible for funding a portion of the salary costs of local districts.[7] In order to qualify for salary assistance through the Minimum Foundation Program, the individual district must agree to pay its teachers at least the minimum salary provided for in the Foundation Program's salary scale. In addition, state assistance may not be used to pay teachers who do not meet TEA certification standards for their assignments except under the terms of a temporary certification arrangement based on the non-certified teacher's taking courses or otner appropriate action to remove his (or her) deficiency. Texas Education Code (1969), Section 16.31. If the district persists in employing non-certified teachers, it is subject to loss of funds for salaries as well as loss of accreditation. Texas Education Code (1969), Section 16.31.

Current practices regarding the hiring of faculty and staff allow the local districts to contract with such personnel on a term basis. Texas Education Code (1969), Sections 22.09 and 23.28. Teachers may also be hired on a

[7]The portion is determined by the district's economic index which reflects the amount of county and local funds available and the amount of state funds needed to allow the district to meet minimum requirements. The average district in Texas receives about 80% of its financial support from the State.

probationary or a continuing contract basis. Texas Educa-

tion Code (1969), Sections 21.201, *et seq.* When a teacher is dismissed, Texas law provides for a specific hearing and appeal procedure, but if a teacher is dismissed at the end of a contract term or period of probation, the plan submitted to the Court by the State asserts that no appeal is provided by statute.

The TEA plan proposed by the Agency would advise all Texas school districts using the National Teacher Examination or similar tests as criteria for teacher employment that such examinations must be uniformly administered to all applicants and all employed personnel, without regard to race, color, or national origin. TEA proposed further to refer any complaints relating to faculty discrimination either to the appropriate federal district court if the school district involved is under court order, or to HEW if the district is operating under a voluntary plan approved by that Department.

The State plan is unacceptable to the Court insofar as it fails to propose any affirmative action in the area of faculty assignments and in regard to discriminatory practices in faculty hiring, demotions, dismissals and promotions. Once again, the Fifth Circuit case of *Singleton* v. *Jackson Municipal Separate School District, supra,* sets the standards for all school districts in the Circuit. The Court stated in part:

> (The faculty and staff) who work directly with the children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students . . . (T)he district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, or substantially the same as each such ratio is to the teachers and other staff respectively, in the entire district. 419 F.2d at 1217-1218.

In addition, *Singleton* established specific standards and procedures for the hiring, firing, demoting or promoting of faculty and staff. *Singleton* v. *Jackson,* supra, at pages 1217-1218.

In accordance with the *Singleton* requirements, the Court believes that the TEA should require local educational agencies desiring to receive state funds under the Minimum Foundation Program to include with their preliminary application for such funds a list of objective, non-racial and non-ethnic criteria by which the county or local agency evaluates its faculty and staff.

During the school year, although the State Agency disclaims any direct power over a local district's treatment of its faculty and staff, the Court believes that faculty discrimination may be reduced through special efforts on the part of TEA to notify faculty and staff throughout the State of the availability of complaint procedures and through the careful and expeditious treatment of any such complaints as are received. The Agency should make clear that appeals or complaints need not be limited to dismissals during a contract term, but may also include complaints involving discriminatory practices short of dismissal, such as forced resignations and failures to renew contracts on account of race, color, or national origin of the teacher or staff member. If TEA's examination of complaints reveals violation of the requirements set by this Order and by the Fifth Circuit in *Singleton,* the State is then obligated to take enforcement measures against the offending district and to withhold or withdraw state funds if the district refuses to comply.[8]

5. *Extra-Curricular Activities*

The standard required in the Fifth Circuit in the area

[8]It should also be noted that if a district is found in noncompliance with Title VI or the Fourteenth Amendment by HEW or by any other agency of the Federal Government, whether executive or judicial, TEA should treat such a finding as conclusive, provided such a finding has been adopted as final agency action by the appropriate executive agency or is not on appeal or eligible for appeal in a judicial proceeding.

of extra-curricular activities is generally stated as follows:

> School districts shall conduct all curricular and extra-curricular activities under its control on a non-discriminatory basis. Such activities shall mean any endeavor, other than academic, participated in by pupils or faculty, or staff of the school district in a student or faculty capacity such as athletics, music or any competition meeting or performance involving one or more schools.

See *United States* v. *Georgia*, C.A. No. 12972 (N.D. Ga., December 17, 1969); *United States* v. *Jefferson County*, 372 F.2d 336 (5th Cir., 1966), *aff'd on rehearing*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967). Further, it has recently been held by the District Court in *United States* v. *State of Georgia, supra*, in a proceeding involving Randolph County, that suspension of programs and activities to avoid operating them on a non-discriminatory basis is unconstitutional. See also *Griffin* v. *State Board of Education, supra*.

The State Agency suggested in its plan that accreditation teams be instructed to include in their inspections an examination of extra-curricular activities to determine whether the district being reviewed is operating such programs in compliance with this Order. The Court agrees with the United States as to the basic soundness of this procedure but also concurs with the Government in its proposal that the state staff of the Office of Equal Educational Opportunities known as "Title IV personnel" be required to accompany the accreditation review teams to determine such compliance and to assist and advise in remedying any deficiencies. Further, the State Agency should investigate promptly any complaints of discrimination in this area, and take enforcement action wherever necessary.

6. *School Curriculum*

TEA's present activities in the field of curriculum, ac-

cording to their plan, consist mainly of consulting services "to assist local school districts in developing meaningful curriculums for desegregated schools." TEA's Accreditation Division routinely examines the curricula in districts under review. Accreditation standards also require a guidance and counseling program.

The TEA proposed to continue to assist local districts through consultative services, to point out deficiencies in course offerings, and to inform districts of differences in such offerings between campuses within districts. The accreditation report sent to the school district would urge implementation of a "comprehensive balanced curriculum on each school campus . . . irrespective of the racial or national origin of the majority of the student body." The Accreditation Division would also emphasize to districts the importance of guidance and counseling, particularly with respect to their efforts to assist minority students.

Although the Agency's plan in this area offers little in the nature of specific course offerings, a well-defined plan in the area of curriculum and other special school programs should be developed, since through expanded curricular offerings, the State may achieve great progress in assuring all children in the State equal educational opportunities. Accordingly, TEA should develop minimum standards aimed at providing equal educational opportunities within local districts in the areas of vocational education, compensatory education for racially or ethnically isolated students, and special programs for children whose primary language is other than English.[9]

[9]Such a requirement finds support in the testimony of Mr. Leon Graham, Assistant Commissioner for Administration, Texas Education Agency, on February 1, 1971. Mr. Graham recognized the educational handicap created by an inadequate knowledge of English and indicated that the State Board of Education has taken "a very strong stand on bilingual education." (Tr. 71, February 1, 1971)

The Court believes that the State's consideration of curriculum development should emphasize three major areas:

a. Vocational Education [10]

In the State Department of Education, there is presently a separate branch under the Assistant Commissioner for Vocational Education responsible for various aspects of the state vocational education program. These include office education, agriculture education, distributive education, literacy and civil defense education, homemaking education and industrial education. Texas Education Code (1969) Sections 11.41 *et seq*.

TEA should investigate the operation of vocational education programs to determine whether minority children are the victims of employment discrimination. If such barriers exist, the State, through appropriate state agencies, and through local school systems, should take whatever steps are required to insure full participation of minority children in such programs on a nondiscriminatory basis.

b. *Compensatory Education for Minority Children in Racially and Ethnically Isolated Schools.* Curriculum development in this area will not, of course, replace efforts to accomplish full desegregation as required by law. Many urban areas in the process of desegregating, however, may presently have racially or enthnically identifiable schools. In order to afford these students equal educational opportunities, the State must, at least until full desegregation is achieved, develop and implement special curricular and extra-curricular activities, which will com-

[10]The TEA plan states that "all vocational education student state *associations* sponsored by TEA . . . have been completely desegregated" since 1965. (Plan, p. 6, emphasis added) The Court is concerned primarily with assuring equal opportunities for all students participating in these programs.

pensate to some extent for the inequality in their education resulting from their racial or ethnic separation. *United States* v. *Jefferson County Board of Education, supra* at page 900. In developing curricular and extra-curricular activities in this area, the State should examine the programs made available by the Federal government as well as those currently available or those which could be developed by the State. Every effort should be made by the State Agency to inform local school districts, their officials and their patrons, of the programs available which are, at least in part, financed by the State or the Federal government, and to encourage participation in them. The State Agency has made its Division of Compensatory Education responsible for overall administration of programs for educationally deprived children under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 214a-244 (hereinafter referred to as ESEA). This statute provides a basis for federal assistance to a broad range of activities. Since this aid must be provided in so-called target areas of high concentration of low-income, educationally deprived families, it may well constitute a source of funds for use of school districts in developing special programs for the racially or ethnically isolated children.[11] In addition to the administering of Federal assistance under Title I, the State Agency is also charged with administering Title II of ESEA (School Library Resources), 20 U.S.C. 821-827, and Title III of ESEA (Supplementary Educational Centers and Services), 20 U.S.C. 841-848. These funds

[11]Activities under Title I could include, for example, remedial programs in which children could participate in special classes run on a bi-racial basis, or field trips on which students from inner-city, racially isolated schools would be joined by children from other areas of the city.

could also be used in connection with programs of compensatory education.[12]

c. *Special Educational Programs for Non-English Speaking Students*: Curriculum in this area should be considered as a specialized form of compensatory education. TEA presently offers consultative services to local districts aimed at teaching English for the non-English speaking student under the Minimum Foundation Program. In addition, the agency administers the distribution of funds under various Federal statutes which may be used to meet the problems of special education for minority children.[13]

Because of the complexity of the problem of curriculum development, the Court believes that the Texas Education Agency should be required, in collaboration with the United States Office of Education (including, but not necessarily limited to, the Title IV staff of that Office) and any other recognized authority or elementary and secondary education, to study this problem in detail and that the State should report to this Court in August, 1971, as to specific courses and programs which it recommends be instituted within the State to improve the educational op-

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[12]Title II funds might be used to provide library materials of special cultural interest to children of minority background. Title III funds could be used to establish centers where children throughout the district could participate together on special projects, remedial activities or extracurricular programs.

[13]For example, under ESEA, Title VII—20 U.S.C. 880b—Bilingual Education, school districts may receive funds to provide classes in Spanish for minority children to assist them in getting an equal education before they are able to use English well enough to compete with their Anglo classmates. Classes may also be conducted in both Spanish and English so that ethnically integrated classrooms may be made possible. Under 20 U.S.C. 241c(a)(6),241e(c)—Aid to Children of Migratory Workers—districts may receive Federal aid to assist in the instruction of children migrants, most of whom are Mexican-American and most of whom are deficient in English.

portunities afforded minority children and to assist them in closing the gap in their previous cultural and educational background caused by past discrimination.[14] The report developed for the Court should include:

(1) Specific curricula and programs aimed at insuring equal educational opportunities for all students regardless of race, color, or national origin; and

(21 Specific standards for requiring local school districts to participate in these programs and to offer the newly developed curricular offerings including, for example, State-wide reading and language skills standards under which a school district would be compelled to show that its students meet minimum requirements to be compelled to participate in appropriate State or Federal programs to assist it in raising the performance of its students.

7. *Student Assignment*

Little more need be said with regard to the State's obligation to enforce Federal standards in the area of overall student assignment. Clearly, the *Green* and *Alexander* decisions of the Supreme Court (both *supra*) place the burden on school authorities to take affirmative action to convert to a unitary system. Moreover, under the latest Supreme Court decision in *Swann* v. *Charlotte-Mecklenburg, supra,* such a unitary system must be one where the "greatest amount of actual desegregation" has been achieved.

Closely related to the problem of student assignment is the problem of segregation of students in or within individual classrooms of a "desegregated" school. Quite clearly,

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[14]Presently, within TEA is the Division of Program Development which is to provide state-wide leadership for stimulation, initiation, planning and coordination or curriculum improvement programs.

it is unconstitutional to assign students to classrooms on the basis of race, *Johnson* v. *Jackson Parish School Board*, 423 F.2d 1055 (5th Cir., 1970); *Johnson v. Marvell School District*, ____ F.2d ____ (8th Cir., 1970), and it should be equally clear that where the State Agency can determine that such discriminatory in-school assignments exist from complaints, accreditation visits or from any other source, the Agency should treat such practices as tantamount to discriminatory student assignment to schools and should act accordingly to eliminate such in-school discrimination whereever it is found.

It would seem feasible, for example, for TEA to review, on a routine basis in conjunction with accreditation reviews, a school district's classroom assignments.[15] In addition, the Agency should, of course, investigate specific complaints in this area through the procedures set up for handling grievances, and appropriate sanctions should be employed where required.

III.

It has been argued to this Court that an Order such as the one here constitutes a misallocation of responsibility and, perhaps, an abdication on the part of the Federal government of the duties rightfully vested in the United States to enforce Federal constitutional and statutory standards. The Court, however, firmly believes that the time is long past for permitting the States of this Union to enjoy the

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[15]Racially or ethnically isolated classes may be a result of an educationally neutral assignment policy, particularly in school districts with high minority ratios or in urban areas with racially or ethnically isolated communities. When such instances come to the attention of TEA, however, they should be investigated carefully to determine whether a valid educational justification for the isolation exists or whether the justification offered is merely a subterfuge to conceal discriminatory student assignments.

benefits of Federal assistance while refusing to accept a concurrent obligation with that of the National government to take affirmative action to insure the protection of constitutional rights and the enforcement of Federal statutes.

The Order of April 20, 1971, does not, therefore, place a new burden of enforcement upon the State. Rather, it constitutes a reminder that the responsibility for achieving and preserving a constitutional system lies at all levels of the governmental structure. Accordingly, all governmental agencies, whether Federal or State, and whether through their executive, judicial or legislative functions, must act, at all times, to guard and secure the rights of all the people — regardless of race, color, or national origin — to enjoy equality and justice under the law.

SIGNED and ENTERED this 11th day of May, 1971.

Wm. Wayne Justice

UNITED STATES DISTRICT JUDGE

APPENDIX "C"

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support

the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SUBCHAPTER V.—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excludtd from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Historical Note

Legislative History. For legislative 1964 U.S.Code Cong. and Adm.News. A history and purpose of Pub.L. 88-352,, see 2355.

§ 1. *Support and maintenance of system of public free schools*

Section 1. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

§ 8. *State Board of Education*

Sec. 8. The Legislature shall provide by law for a State Board of Education, whose members shall be appointed or elected in such manner and by such authority and shall serve for such terms as the Legislature shall prescribe not to exceed six years. The said board shall perform such duties as may be prescribed by law. As amended No. 6, 1928.

Section 11.01. *Composition and Purpose*

The State Board of Education, the State Board for Vocational Education, the state commissioner of education, and the State Department of Education shall comprise the Central Education Agency. It shall carry out such educational functions as may be assigned to it by the legislature, but all educational functions not specifically delegated to the Central Education Agency shall be performed by county boards of education or district boards of trustees.

§11.14. *Right Denied to Close or Consolidate Any Public School District*

(a) The provisions of this chapter shall not be construed to give the State Board of Education, the commissioner of education, the State Department of Education, or anyone whomsoever the power to close, to consolidate, or cause by

regulation or rule to be closed or consolidated, any public school district in this state.

(b) The provisions of this code regarding and applicable to the consolidating, annexing, or otherwise closing of school districts of this state shall govern in all such matters.

§ 12.61. *Requisitions*

(a) On the first school day of April each teacher shall report the maximum attendance of each of his grade levels taught, to the school principal or superintendent, if any, or to the county superintendent.

(b) Within one week subsequent to the first school day in April compiled reports as to the maximum attendance for the school shall be made by the principal to the superintendent or, if there is no district superintendent, the report shall be made to the county superintendent having jurisdiction of the district.

(c) Each superintendent of an independent school district, and each principal of a school district classified as common having a scholastic population of 300 or more and electing to have its books requisitioned and distributed directly to the district, shall compile maximum attendance reports and make such reports to the commissioner of education.

(d) Each county superintendent shall compile reports of the schools classified as common and under his jurisdiction (except for those electing to requisition directly as provided in Subsection (c) of this Section), and make a report to the commissioner of education.

(e) Books needed as reported in Subsection (d) of this section shall be requisitioned and distributed entirely through the office of the county superintendent. However,

any school district classified as common with a scholastic population of 300 or more may elect to have its books requisitioned and distributed in the same manner as are those for independent school districts. The duties of the county superintendent with reference to the care and distribution of textbooks shall be subject to the approval of the county school board and the commissioner of education.

(f) Reports as to the maximum attendance of each school shall be made to the commissioner of education as prescribed in Subsections (c) and (d) of this section not later than April 25 of each year. Blank forms for such reports and for the requisition of textbooks shall be prepared and furnished by the State Department of Education.

(g) Requisition for textbooks for a subsequent session shall be based on the reports of the maximum number of scholastics in attendance during the preceding school session, plus an additional 10 percent, except as otherwise provided. Requisitions shall be made through the commissioner of education and furnished by him to the state depository designated by contractors of books not later than June 1 of each year; but in cases of unforeseen emergency the designated state depository shall fill orders for books on requisition approved by the State Department of Education.

(h) Requisitions for textbooks shall be delivered to the county superintendent by each principal or superintendent of those school districts whose books are requisitioned and distributed through the county superintendent.

(i) Requisitions for supplementary readers and other textbooks may be made at convenient times during the session and should be made within one month in advance of the time the books will be needed.

§ 16.13. *Classroom Teacher Units*

Classroom teacher professional units for each school district, which may be separate for whites and Negroes, shall be determined, and teachers allotted in the following manner:

(1) To school districts having fewer than 15 pupils in average daily attendance, no classroom teacher unit, except that in cases of extreme hardship, such districts may be allotted on a year-to-year basis one classroom teacher unit if so recommended by the county school board and approved by the state commissioner of education;

(2) To school districts having from 15 to 25 pupils, inclusive, in average daily attendance, one classroom teacher unit;

(3) To school districts having from 26 to 109 pupils, inclusive, in average daily attendance, two classroom teacher units for the first 26 pupils and one classroom teacher unit for each additional 21 pupils (no credit to be given for fractions);

(4) To school districts having from 110 to 156 pupils, inclusive, in average daily attendance, six classroom teacher units;

(5) To school districts having from 157 to 444 pupils, inclusive, in average daily attendance, one classroom teacher unit for each 24 pupils, or fractional part thereof in excess of one-half;

(6) To school districts having from 445 pupils to 487 pupils, inclusive, in average daily attendance, 19 classroom teacher units;

(7) To school districts having from 488 to 1,512 pupils, inclusive, in average daily attendance, one classroom teacher unit for each 25 pupils, or fractional part thereof in excess of one-half;

(8) To school districts having from 1,513 to 1,599 pupils, inclusive, in average daily attendance, 61 classroom teacher units;

(9) To school districts having 1,600 or more pupils in average daily attendance, one classroom teacher unit for each 26 pupils, or fractional part thereof in excess of one-half; and

(10) To school districts which operate and have operated at least three consecutive years a four-year accredited high school and having an average daily attendance range between 84 and 156 for the immediate preceding year, the number of professional units shall be based and alloted as follows:

(A) A district having from 84 to 106 pupils, inclusive, in average daily attendance, shall be allotted six classroom teacher units;

(B) A district having 107 to 156 pupils, inclusive, in average daily attendance, shall be allotted seven classroom teacher units.

§ 16.52. *Public School Transportation System*

(a) The county school boards of the several counties of this state, subject to approval by the state commissioner of education, are authorized to establish and operate an economical public school transportation system within their respective counties.

(b) In establishing and operating such transportation systems, the county school boards shall:

(1) requisition buses and supplies from the state board of control as provided for in this subchapter;

(2) prior to June 1 of each year, with the commissioner's approval, establish school bus routes within their respective counties for the succeeding school year;

(3) employ school bus drivers; and

(4) be responsible for the maintenance and operation of school buses.

§ 19.231. *Districts Which May Consolidate*

(a) Subject to the limitation of Subchapter K of this chapter,[1] any of the following groups of school districts may, by the procedure described in this subchapter, consolidated into a single school district:

(1) two or more contiguous common or county-line common school districts;

(2) two or more contiguous independent or county-line independent school districts;

(3) one or more independent or county-line independent school districts and one or more common or county-line common school districts constituting as a whole one continuous territory;

(4) a rural high school district and one or more contiguous common or county-line common school districts; or

(5) one or more rural high school districts and one or more independent or county-line independent

[1]Section 19.331 et seq.

school districts, where all of the districts constitute as a whole one continuous territory.

(b) The combined districts may all be located wholly within a single county, or they may be located in adjoining counties; or the combined districts may be composed of one or more districts located wholly within one or more counties and one or more county line districts.

§ 19.261. *Detachment and Annexation*

(a) The county school trustees or county board of education, as the case may be, in each county of this state shall have the authority, when duly petitioned as herein provided and in compliance with the limitations of Subchapter K of this chapter,[1] to detach from and annex to any school district territory contiguous to the common boundary line of the two districts.

(b) The petition requesting detachment and annexation must:

(1) be signed by a majority of the qualified voters residing in the territory to be detached from one district and added to the other; and

(2) give the metes and bounds of the territory to be detached from one district and added to the other.

(c) The proposed annexation must be approved by a majority of the board of trustees of the district to which the annexation is to be made.

(d) Unless the petition is signed by a majority of the trustees of the district from which the territory is to be

[1]Section 19.331 et seq.

detached, no school district territory may be detached where the ratio of the number of scholastics residing in the area to be detached to the total number of the scholastics residing in the district from which the territory is to be detached is less than one-half the ratio of the assessed valuation (based on preceding year valuations) in the territory to be detached to the total assessed valuation (based on the preceding year valuations) of the district from which the area is to be detached.

(e) No school district may be reduced to an area of less than nine square miles.

(f) Upon receipt of the petition and notice of the approval as required by this section, the county governing board shall notify the trustees of any other common school districts which may be affected by any contemplated change and specify the place and date at which a hearing on the matter shall be held and at which the trustees of any common school district to be affected shall be given an opportunity to be heard.

(g) After the conclusion of the hearing, the county governing board may pass an order transferring the territory and redefining the boundaries of the district affected by the transfer. The order shall be recorded in the minutes of the county governing board.

(h) Any outstanding indebtedness affected by a change in boundaries shall be adjusted by the county governing board as provided in Subchapter N of this chapter.[2]

§23.50. *Loss of Accreditation*

The agency shall drop from the list of accredited schools any district which fails to comply with the provisions of

[2]Section 19.431 et seq.

this subchapter or with the rules and regulations of the State Board of Education pursuant thereto.

Art. 2696a. *Annual transfers of children from resident districts*

Section 1. Any child, other than a high school graduate, who is over six and under 21 years of age at the beginning of any scholastic year may annually transfer from his school district of residence to another Texas district, provided that both the receiving district and the applicant parent or guardian or person having lawful control of the child jointly approve and timely agree in writing to transfer.

Such transfer agreement(s) shall locally be filed and preserved as a receiving district record for audit purposes of the Central Education Agency.

Sec. 2. Upon the filing and certification of the transfer of any such child in the manner timely and in the form prescribed by regulations of the State Board of Education, the state per capita apportionment shall transfer with the child; and for purposes of computing state allotments of districts as are eligible therefor under the Foundation School Program Act, the attendance of the child shall transfer and be counted by the transfer receiving district.

Sec. 3. The receiving district may charge a tuition fee to the extent that the district's actual expenditure per student in average daily attendance, determinable by its Board of Trustees, exceeds the sum the district benefits from the state aid sources as provided in Section 2. However, unless a tuition fee is prescribed and set out in transfer agreement prior to its execution by the parties, no increase in tuition charge shall be made for the year of that transfer that exceeds the tuition charge, if any, of the preceding school year.

Acts 1969, 61st Leg., p. 510, ch. 175, emerg. eff. May 9, 1969.

Art. 2815—4. *Incentive aid payments to independent school districts created through consolidation*

Section 1.

A. (1) The amount of Incentive Aid Payments shall not exceed the difference between the sum of the Foundation Program Payments which would have been paid to the several districts included in the newly organized district had there been no consolidation, and the amount of Foundation Program Assistance for which the new district qualifies.

(2) Where, however, such newly organized district is budget balance (not eligible for Foundation Program Payments) the amount of the Incentive Aid Payments shall not exceed the sum of the Foundation Program Payments for which the several districts included in the newly organized district were eligible in the scholastic year when they were consolidated.

(3) Provided further, that where there have been, or hereafter may be one, or a series of consolidations at intervals in compliance with and pursuant to the provisions of Article 2815—4, Revised Civil Statutes of Texas, the lastly created or newly organized independent school district shall be eligible to receive at due times the total sum of the series of Incentive Aid Payments as computed separately at the time of the several consolidations, subject to provisions in this Act. With respect to all such consolidations heretofore effected, the ten (10) year payment period shall be computed from the date of consolidation, or from the effective date of this amendatory Act, whichever is the latest. As amended Acts 1965, 59th Leg., p. 105, ch. 40, § 1, emerg. eff. March 22, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-501

DR. J. W. EDGAR, COMMISSIONER OF EDUCATION, AND THE TEXAS EDUCATION AGENCY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We respectfully invite the Court's attention to the following facts which show that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on July 9, 1971. A motion for a stay pending application for writ of certiorari was denied by the court of appeals on July 16, 1971, and a similar application to this Court was denied on July 29, 1971, by Mr. Justice Black.[1] The time for filing a petition for a writ of certiorari expired on October 7, 1971, and no extension was sought. Since the petition was not filed until October 8, 1971, this Court lacks jurisdiction. 28 U.S.C. 2101(c).

449-158—71

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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[1] In denying the stay, Mr. Justice Black stated: "The District Court's opinion and order are comprehensive and well reasoned. In my judgment the facts found by the District Court, which do not appear to be materially disputed by the applicants, fully justify the order."

U.S. GOVERNMENT PRINTING OFFICE: 1971